upheld, the Commission lawfully should, in the alternative, enforce the provisions of Section 22.33(b) of the rules against TDS.

1. The MO&O's Construction of "Ownership Interest" in Section 22.921(b)(1) of the Rules is Contrary to the Ordinary Meaning of the Term and is Otherwise Predicated on a Patent Fallacy.

Section 22.921(b)(1) of the rules explicitly provides, in pertinent part, that:

> "No party to a wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, except that interests of less than one percent will not be considered."

The crucial issue of interpretation, of course, is the proper construction of the term "ownership interest". In effect, the MO&O's interpretation improperly substituted the narrower term "equity" interest for the broader term "ownership" interest actually employed by the rule. In relevant part, the MO&O states:

> "Since none of the settling applicants won the lottery, the contingent clause never became effective and, thus, no substituted application was ever filed including UTELCO (and, thus, TDS) as a minority partner." MO&O at Para. 7. (Emphasis added).

The fallacy evident in the MO&O's reasoning is that had the "contingency" occurred, i.e., had the application substitution actually been made, TDS (through UTELCO) would have had an overt equity interest in the substituted application by virtue of UTELCO's status as a minority

partner in such substituted application. However, an equity interest is only one form of "ownership interest"; it by no means encompasses the entire set of interests which constitute "ownership interests" under the law.

In fact, the act of becoming a party to the Settlement Agreement conferred on TDS (through UTELCO) a "chose in action" with respect to the various applications subject to the same agreement.* It is also elementary that the term "own" means to have or hold as property;** that a "chose in action" is a form of personal property;*** and that "interest" in this context means a "right, title or legal share in something".****

It is thus entirely irrelevant that the Settlement

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* The Settlement Agreement plainly constituted an executory contract which, by virtue of UTELCO becoming a party, conveyed to TDS (through UTELCO) a chose in action with respect to the various applications subject to the Settlement Agreement. See generally, e.g., 17 Am Jur 2d, Contracts, Sec. 6.

** See, e.g., Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc. (Springfield, MA).

*** See, e.g., 63A Am Jur 2d, Property, Sec. 25.

**** Webster's Ninth New Collegiate Dictionary, supra. The FCC's rules also otherwise explicitly recognize that the requisite "interest" in an application can be conveyed by a "contract" without having been reduced to an actual equity interest. See, e.g., Item No. 18 of Form 401, which inquires: "Is applicant directly or indirectly, through stock ownership, contract, or otherwise currently interested in the ownership or control of any other licensed radio stations or pending applications for radio stations under Part 22 within 40 miles of the station applied for here? (See Sections 22.13(a) of FCC Rules and Regulations.)" (Emphasis added).

Agreement remained an executory contract and was never converted into an "equity" position by TDS in a substituted application. Quite to the contrary, the fact plainly remains that by virtue of becoming a part of the "joint enterprise" entitled under the rules to cumulative chances in the lottery, there was conveyed to TDS (through UTELCO) an "ownership interest" in the applications which conferred the cumulative chances. It also plainly remains that the "ownership interest" created by the Settlement Agreement exceeded the one percent threshhold permitted under Sec. 22.921(b)(1) of the rules.*

It is incontestible that TDS at all times maintained 100% ownership of its own application for the Wisconsin 8 RSA. That application is the "one application" to which TDS is entitled under Sec. 22.921(b)(1). But TDS did not stop there. Instead, it went on to also acquire a pre-lottery

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* In this regard, the MO&O improperly twists Century's argument in the Petition to Deny. The MO&O erroneously characterizes Century's argument as being that the Settlement Agreement "give[s] each signatory to the agreement a pro rata ownership interest in each of the ten applications filed by the wireline applicants", and that such was the core of the violation of Sec. 22.921(b)(1) urged by Century. See MO&O at Para. 7. To the contrary, the core violation actually urged in the petition is that TDS maintained "ownership of 100% of its own application," on the one hand, while simultaneously acquiring a pre-lottery 3.5% interest in the "joint enterprise" with cumulative lottery chances, i.e., in the "Settlement Group". See Petition at p. 6. Century's previous reference to the "equivalent of a 3.5% interest in each of ten additional applications," which the MO&O seized upon, was merely to show that the one percent threshhold established by the rule was clearly exceeded under any possible analysis. The MO&O plainly took Century's reference out of context.

general partnership in the "joint enterprise[]" which maintained ten additional applications and, hence, ten cumulative lottery chances for the participants in the "joint enterprise" -- including TDS (through UTELCO). In doing so TDS plainly acquired a pre-lottery "ownership interest ... in more than one application" contrary to the plain language of Section 22.921(b)(1). (Emphasis added). The MO&O's contrary conclusion is wholly untenable and insupportable and must be set aside.

2. The Ruling of the MO&O is Inconsistent with the Fundamental Purpose of Section 22.921(b)(1) to Prevent Unfair Manipulation of the Lottery Process, and Frustrates the Commission's Policy Favoring Wireline Settlements.

As the Commission itself observed, its purpose in adopting Sec. 22.921(b)(1) of its rules was to "maintain ... fairness in the lottery selection process" and to do so by "preventing schemes" of all kinds in which an applicant "obtain[s] a ... significant interest in more than one application in a market".* In this regard, the Commission expressly recognized that a "creative applicant" using various "voting or other arrangements" could still "enter into such schemes [to obtain a significant interest in more than one application in a market];" and it expressly emphasized its intent to "carefully scrutinize" situations

* Cellular Radio Lotteries, 101 F.C.C. 2d 577, 600 (1985).

which appear to "skew[] the lottery".* Indeed, the Commission even went so far as to pledge unconditionally that it "will not allow parties who attempt to circumvent our lottery procedures to obtain a cellular license". Id. (Emphasis added).

The facts before the Commission in this proceeding evidence precisely just such a manipulative scheme. Yet, not only does the MO&O afford only the most superficial analysis of the record, contrary to the Commission's pledge to "carefully scrutinize" such situations, but also the MO&O overtly rewards TDS for its attempted manipulation.

By refusing at the last minute to execute the Wisconsin 8 RSA Settlement Agreement, TDS unfairly skewed the lottery odds in its favor. This is so because had TDS executed the Settlement Agreement, it ultimately would have obtained a 9.94% interest in the license for the Wisconsin 8 RSA if any one of 11 applications were selected in the lottery, i.e., if TDS' application or the application filed by any of the 10 settling parties who filed applications and entered into the Settlement Agreement.**

However, since UTELCO had already been admitted into the Settlement Group, TDS was already assured of at least a

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* Id. at n. 68. (Emphasis added).

** If TDS had executed the Settlement Agreement there would have been a total of 15 parties participating pro rata, including both TDS and UTELCO. TDS' one-fifteenth (6.67%) plus 49% of UTELCO's one-fifteenth (3.27%) totals 9.94% for TDS if any of the 11 applications were selected.

3.5% interest in the license if any of the 10 other party-applicants were selected in the lottery.* By not executing the Settlement Agreement, TDS would retain 100% of the license if TDS' application were selected -- not the 9.94% it would have had if TDS executed the Settlement Agreement. By so manipulating the process, TDS was thus able to skew the lottery odds unfairly in its favor, contrary to the express purpose of Section 22.921(b)(1) of the rules. Inexplicably, the MO&O did not even acknowledge, much less "carefully scrutinize" TDS' behavior, as pledged by the Commission when it adopted the rule.

The result achieved by the MO&O is all the more eccentric because it explicitly rewards TDS for engaging in what can most charitably be described as unethical negotiating practices. In fact, the record before the Commission makes out a prima facie case of bad faith dealings by TDS with the Settling Partners in order to obtain a cellular license.**

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* In such case, 14 parties would have participated pro rata in the Settlement Group, providing 7.14% for each participant. TDS' 49% of UTELCO's 7.14% interest would thus have been 3.5%.

** In this regard, the MO&O rejected Century's proffer on September 21, 1989, of the Supplemental Declaration Under Penalty of Perjury of Fred Englade, which amplified on the facts and circumstances surrounding the negotiations by TDS and the Settling Partners. The MO&O did so with the ambiguous finding that "the Declaration provides no new pertinent facts". MO&O at Para. 1 & n. 1. If the MO&O meant that the facts set forth in the Supplemental Declaration were not "new," i.e., were merely cumulative of the facts already adequately set forth in the record, that

In its recent review of the proper role and scope of "character qualifications" in the Commission's licensing processes, the Commission observed:

> "the Commission must be able to have confidence that its licensees are honest and that the data submitted by them are dependable. Dishonest practices threaten the integrity of the licensing process.[35]
>
> "35. Likewise, licensee practices which abuse the licensing procedure also undermine the integrity of the Commission's decisionmaking process."*

At the conclusion of that proceeding, the Commission explicitly reaffirmed that it properly must, under the Communications Act, "focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies." Character Qualifications, 102 F.C.C. 2d 1179, 1183 (1985). The Commission went on the conclude that "it is necessary and appropriate to continue to view misrepresentation and lack of candor in an applicant's dealings with the Commission as serious breaches of trust. The integrity of the Commission's processes cannot be maintained without honest dealing with the Commission by licensees." Id. at 1211.

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is one thing. TDS has not attempted to contradict the existing record with its own offer of proof. On the other hand, if the MO&O meant that the facts set forth in the Supplemental Declaration were not "pertinent," i.e., were irrelevant to proper analysis of the issues raised by the Petition, then the ruling was reversible error.

* FCC Policy on Character Qualifications, 87 F.C.C. 2d 836, 846 (1981).

Wireline settlement negotiations hold a unique status in the Commission's licensing processes, and effectively are a "surrogate" for many of the functions which would otherwise have to be performed in comparative hearings and similar formal proceedings conducted by the staff. The Settling Partners believe it is self-evident that had TDS engaged in such bad faith negotiations directly with the Commission's staff, rather with the Partners, the Commission would have found that a clear and disqualifying breach of trust occurred. Under such circumstances, it is wholly unfathomable that the MO&O could let the same conduct pass unchallenged because it was engaged in with the Settling Partners and not directly with the staff.

As a final consideration in this regard, the Settling Partners are constrained to point out that the MO&O stands reason and logic on their heads with its unelaborated finding that adopting the position set forth in the petition to deny herein would be "inconsistent with the Commission's policy of favoring full or partial settlements among wireline RSA applicants." MO&O at Para. 7. In fact, precisely the opposite is true, viz., that rewarding TDS with a license in this case would be "inconsistent with the Commission's policy of favoring full or partial settlements among wireline RSA applicants."

Prior to the MO&O, the Settling Partners and others rightfully could expect that wireline applicants for a

cellular license would deal in good faith with each other, and that they could rely upon settlement negotiations being conducted under such an overarching umbrella. Because of that, and given that a large number of negotiations with a large number of parties are necessarily going on at any given time simultaneously, it obviously facilitates the prompt and timely resolution of such negotiations to eschew the level of formality and suspicion normally associated with arms-length bargaining between strangers. After all, all of the parties to wireline settlement negotiations customarily have a "presence" in the market in question, which takes -- or at least should take -- the cellular negotiating realm beyond mere business negotiations.

The Settling Partners and others thus should be able to conduct their negotiations secure in the knowledge that if a wireline party occasionally transgresses the outer limits of fair dealing in order to skew the lottery in its favor, this Commission will be vigilant to punish the offender and vindicate the integrity of its processes. Unless the MO&O is set aside and annulled, however, such negotiations in the future will have to be conducted under different "ground rules," i.e., ground rules appropriate for arms-length negotiations between strangers. Such a development will unquestionably obstruct and impede such negotiations and frustrate the Commission's policy favoring full or partial

settlements.*

3. Even if the MO&O's Interpretation of Section 22.921(b)(1) is Upheld, the Corporate Veil Between TDS and UTELCO Should be Pierced for Purposes of the Cumulative Lottery Chances Provided for in Section 22.33(b) of the Rules.

The Settling Partners also are constrained to point out that even if the MO&O's interpretation of "ownership interest" for purposes of Section 22.921(b)(1) is upheld, contrary to all logic and reason, such interpretation is not the end of the inquiry which the Commission must make herein. Rather, in such case the Commission alternatively should disregard the corporate veil between TDS and UTELCO, as it uniformly does whenever presented with "real party in interest" or similar issues under Section 22.13(a) of the rules. Accordingly, the Commission should enforce Section 22.33(b) of its rules against TDS and deem it a part of the "joint enterprise" which is entitled to "the cumulative number of lottery chances that the individual applicants

* Another unfortunate byproduct of the MO&O which bears mentioning at this point is that it frustrates the policy underlying the Commission's use of the wireline set-aside in the first place. One of the laudable features of the Settlement Agreement in this case is that it admitted into the group four LECs with a presence in the RSA that had not filed applications. UTELCO was included in this group of four with the understanding that TDS would also participate. In doing so the Settling Partners shared the Commission's view in adopting the set-aside that it is an important element of public policy to encourage small, rural LECs to participate in cellular service and thus to preserve a stake in the future of telephony. The MO&O, however, rewards the Settling Partners for their broadmindedness by slapping them in their faces.

would have had if no partial settlement had been reached."

That is, if the Commission does not rule that TDS' application is defective for violation of Section 22.921(b)(1) of the rules, as urged in the previous sections, the Commission should nonetheless properly interpret and enforce Section 22.33(b) of its rules against TDS. In such case the Commission should pierce the corporate veil and determine that TDS (through UTELCO) was a member of the "joint enterprise[]" for purposes of Section 22.33(b) of the rules. The Commission should further determine that the "joint enterprise" was entitled to 11 cumulative lottery chances corresponding to the applicant-members of the "joint enterprise," which is the same number that the individual applicants would have had if no partial settlement had been reached. The Commission should further determine that TDS' application conferred the 11th lottery chance.

The Commission should then afford TDS a 30-day period in which to file amendments to its application in conformance with the Commission's findings and conclusions. Failing such amendment TDS' application would be dismissed as defective and the RSA returned to lottery. While this analysis would not provide a satisfactory or prudent interpretation of Section 22.921(b)(1) of the rules, it would at least offer the virtue of sending a message to TDS, and others similarly inclined, that unethical behavior will

not be rewarded by the Commission. Such a message, although not ideal, would still be a vast improvement over the MO&O.

4. The MO&O's Failure to Enforce Section 1.65 of the Rules is Patently Arbitrary and Contrary to Sound Public Policy.

The discussion in the foregoing sections obviates the need for an extended critique of the MO&O's analysis of TDS' failure to amend its application to notify the Commission that TDS' subsidiary UTELCO had entered into a partial settlement agreement with the Settling Partners. The MO&O first acknowledges, as it obviously must, that entering into a settlement agreement is precisely the type of material event which ordinarily triggers the application of Section 1.65 of the rules. But then, astonishingly, the MO&O absolves TDS of its dereliction because, according to the MO&O, "TDS was not a party to the settlement agreement, and UTELCO was not an applicant"! MO&O at Para. 7.

Such a conclusion can be maintained only with the most elementary and sophomoric analysis which is unbecoming of the agency. The fact that TDS entered into the Settlement Agreement indirectly through its subsidiary UTELCO, and not directly in its own name, is a distinction without a difference. In such circumstances the Commission -- indeed, all regulatory agencies -- routinely pierce the corporate veil and attribute the actions of a subsidiary to its parent for purposes of determining compliance with regulatory requirements. Moreover, the MO&O cites no authority

whatsoever for this astounding deviation from standard agency practice.

To excuse TDS from compliance from 1.65 of the rules in this case because the action triggering its application was done by a subsidiary would obviously wrench a gaping loophole in the otherwise comprehensive scope of that rule, and would obviously undermine severely the Commission's ability to enforce its rules and policies. Just as the Commission must rely on the integrity of its licensees, so must it also rely on the fact that the licensees will make full disclosure of their actions, thereby enabling the Commission to make sound determinations as to what regulatory course best serves the public interest.

Moreover, Item No. 18 of Form 401 submitted by TDS as a part of its application herein expressly inquires:

> "Is applicant directly or indirectly, through ... contract ... or otherwise currently interested in the ownership ... of any ... pending applications for radio stations under Part 22 within 40 miles of the station applied for here? (See Sections 22.13(a) of FCC Rules and Regulations.)" (Emphasis added).

In turn, Section 22.13 expressly defines a "subsidiary" to mean companies with five percent or more common ownership. Thus, by failing to disclose that TDS' subsidiary UTELCO had entered into the Settlement Agreement with respect to the ten contemporaneous applications for the same RSA, the information supplied in response to Item No. 18 of TDS' application was rendered materially incomplete

and/or inaccurate -- precisely the event which Section 1.65 of the rules prohibits. The MO&O's woeful attempt to excuse TDS from this rule is wholly unjustifiable and should be set aside.

Conclusion

The MO&O should be reversed, and TDS' application should be rejected as defective for violation of Sections 22.921(b)(1) and 1.65 of the rules, and the Wisconsin 8 RSA should be submitted for another lottery. Alternatively, the Commission should conclude that TDS, through UTELCO, was part of the "joint enterprise[]" entitled to 11 cumulative lottery chances. The Commission should thus require TDS to appropriately amend its application, failing which the application would be rejected as defective and the Wisconsin 8 RSA submitted for another lottery.

Respectfully submitted,

CENTURY CELLUNET, INC.
CONTEL CELLULAR, INC.
COON VALLEY FARMERS TELEPHONE COMPANY, INC.
FARMERS TELEPHONE COMPANY
HILLSBORO TELEPHONE COMPANY
LAVALLE TELEPHONE COOPERATIVE
MONROE COUNTY TELEPHONE COMPANY
MOUNT HOREB TELEPHONE COMPANY
NORTH-WEST CELLULAR, INC.
RICHLAND-GRANT TELEPHONE COOPERATIVE, INC.
VERNON TELEPHONE COOPERATIVE
VIROQUA TELEPHONE COMPANY

By 
Kenneth E. Hardman

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Telephone: 223-3772

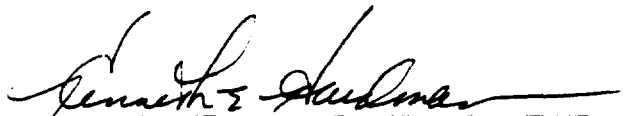
Their Attorney

December 14, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Reconsideration upon Telephone and Data Systems, Inc. by mailing a true copy thereof, first class postage prepaid, to its attorney, Peter M. Connolly, Esquire, Koteen & Naftalin, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036.

Dated at Washington, D.C., this 14th day of December, 1989.


Kenneth E. Hardman

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.	)	
	)	File No. 10209-CL-P-715-B-88
For Authority To Construct and	)	
Operate a Domestic Cellular	)	
Radio Telecommunication System	)	
On Frequency Block B To Serve	)	
The Wisconsin RSA #8 - Vernon	)	
Rural Service Area; Market	)	
No. 715	)	

OPPOSITION TO PETITION
FOR RECONSIDERATION

Telephone and Data Systems, Inc. ("TDS"), by its attorneys, hereby files its Opposition to the "Petition For Reconsideration" of the grant of its above-captioned application[1] filed by Century Cellunet and other wireline applicants in Wisconsin RSA #8 (hereafter "Settling Parties") The Petition For Reconsideration constitutes an attempt to reargue Century's earlier "Petition To Dismiss or Deny" in a different form. The Petition For Reconsideration should accordingly be denied and the Memorandum Opinion and Order ("MO&O") granting TDS's application should be affirmed.

Introduction

The Petition For Reconsideration restates, at length, the position put forward by Century in its earlier Petition To Dismiss or Deny that TDS acquired a cross-interest in the applications of

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[1] See Telephone and Data Systems, Inc., DA 89-1420, released November 13, 1989 (M.S.D.)

Century and nine other Wisconsin RSA #8 wireline applicants in violation of Section 22.921(b)(1) of the Commission's Rules and failed to report that interest in violation of Section 1.65 of the Rules. TDS's alleged interest arises from the fact that Century and the other members of its settlement group admitted into their group UTELCO, Inc., a local exchange carrier in Wisconsin RSA #8 which did not file an application for that RSA and in which TDS holds a 49% minority interest.

In TDS's Reply to the earlier Petition, which is attached hereto for the Commission's convenience (Attachment A), we showed that TDS had no such prohibited cross-interests and was thus not obliged to report them. TDS showed (1) that settlement agreements do not create the type of "ownership interests" which are subject to Section 22.921(b)(1); (2) that cellular lottery winners are not in any way subject to settlement agreements unless the lottery winner chooses to amend its application to substitute a settlement group as the applicant; (3) that this settlement agreement, by its terms, is not yet operative and therefore could not create rights and obligations on the part of its signatories, let alone non-parties such as TDS; and (4) that TDS's application could not be dismissed for violating Section 22.921(b)(1) when that Rule had never been interpreted to cover settlement agreements, let alone a settlement agreement between applicants and a non-applicant in which a non-settling applicant had a minority interest.

TDS further showed that since the settlement agreement imposed neither duties nor obligations on TDS and did not change the infor-

mation in TDS's application, TDS was not obliged to report its existence under Section 1.65.

The Mobile Services Division ("MSD") in the MO&O agreed with TDS's conclusions as to both Sections 22.921(b)(1) and Section 1.65 and thus granted TDS's application.

In their Petition For Reconsideration, the Settling Parties make no new arguments which in any way undermine those of TDS concerning the matters at issue in our earlier "Reply" or the MSD's conclusions in the MO&O. However, certain points raised by the Settling Parties are worthy of brief discussion here.

I. The MO&O's Construction of The Term "Ownership Interest" In Section 22.921(b)(1) Was Precisely Correct

The Settling Parties (Petition, pp. 7-10) attack the MO&O's correct conclusion that settlement agreements do not create the type of "ownership interests" proscribed by Section 22.921(b)(1). They do not do so by attempting to demonstrate, with decisional support, that TDS's previous analysis of the meaning of Section 22.921(b)(1) was in error, but rather by seizing on a point made in Paragraph 7 of the MO&O. The MSD found that:

> "Since none of the settling applicants won the lottery the contingent clause [in the settlement agreement] never became effective and, thus, no substituted application was ever filed including UTELCO as a minority partner."

Thus TDS (through UTELCO) acquired no interests in the applications of the Settling Parties, since the settlement agreement which would have given UTELCO an interest in the partnership was never implemented. This would seem an obviously correct conclusion but the

Settling Parties attempt to refute it by an argument truly medieval in its origins and irrelevance.

The Settling Parties assert, citing no FCC authority, that TDS (through UTELCO) acquired a "chose in action" with respect to the applications subject to the settlement agreement through the operation of the settlement agreement as an "executory contract."[2] The Settling Parties then tortuously reason that "the term 'own' means to have or hold as property, that a chose in action is a form of personal property and 'interest' in this context means a right, title or legal share in something." (footnotes omitted) (Petition, p. 8). Ergo, TDS did acquire an "ownership interest" in the applications of the settling parties.

However, as TDS pointed out at pp. 3-7 of our earlier Reply, and as the MSD has now held in the MO&O, settlement agreements do not create any form of ownership interests which are cognizable under Section 22.921(b)(1). It is the FCC rule and the FCC's understanding of its Rule which is relevant here and not twisted applications of concepts embodied in the common law forms of action.

Moreover, in any case, if any entity did possess a "chose in action" with respect to the applications of Century and the other

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[2] The primary definition of "chose in action" in Black's Law Dictionary (1951 ed.) is "a personal right not reduced into possession, but recoverable by a suit at law." An additional definition is "personalty to which the owner has a right of possession in future, or a right of immediate possession, wrongfully withheld."

settlement group members, it would be non-applicant UTELCO and not UTELCO's minority stockholder, TDS.

II. The FCC Is Also Not The Proper Forum Within Which To Adjudicate Settling Parties Claims of TDS's Unfairness in Negotiations

The Petition (pp. 10-16) argues that wireline telephone companies engaged in cellular settlement negotiations act as a kind of "surrogate" for the FCC and that "unethical negotiating practices" by applicants should be dealt with the FCC in the same manner as adjudicated findings of lack of candor on the part of FCC licensees. The Settling Parties also maintain that TDS has engaged in "unethical negotiating practices" (Petition, p.12) and "bad faith negotiations" (Petition, p. 14) and accordingly assert that TDS should lose its permit (Petition, p. 15).

This argument is both absurd and offensive.

The FCC has no roving commission to police the "negotiating practices" of its applicants. Its responsibilities are to enforce its own rules and policies and they are quite sufficient to occupy the Commission's full time and attention. Further, it is difficult to imagine parties less capable of serving as "surrogates" for the FCC in enforcing its Rules than rival applicants in a contested proceeding. The self-interested opinions of the Settling Parties as to TDS's character are worth less than nothing. If the Settling Parties believe that they have somehow been misled by TDS in a manner cognizable under contract or other civil law, they have ample recourse in the Wisconsin state courts. The FCC neither can nor should deal with irrelevant allegations of this kind.

However, we cannot let pass unchallenged the false allegation that "the record before the Commission makes out a prima facie case of bad faith dealings by TDS." (Petition, p. 12). TDS categorically denies any such bad faith and the petition fails to make any claim which raises a substantial and material question as to TDS's qualifications to hold its license.

The most that can be said of the "record" before the Commission is that it contains ex post facto allegations by Century to the effect that the Settling Parties hoped and perhaps expected that TDS would sign their settlement agreement. This "expectation" was evidently predicated on TDS's proposing of unspecified "revised language" for the agreement which the other parties to it accepted. However, it is common for parties engaged in negotiations to exchange draft language and then not reach final agreements. Moreover, nowhere does Mr. Englade, the Settling Parties' only affiant, state that any TDS officer or employee ever promised him or anyone else that TDS would sign the agreement.

The Settling Parties' claim of unfairness arises from the fact that UTELCO was permitted to sign the agreement while TDS did not sign it. However, if the Settling Parties had wished to condition UTELCO's right to participate in the settlement group on TDS's also doing so, it would have been a simple matter to have said so in the agreement.

The Settling Parties' allegations do not demonstrate bad faith on TDS's part and do not, to put it mildly, furnish any basis for revoking TDS's permit.

III. Section 22.33(b) of The Commission's Rules Furnishes No Independent Basis For Reversing The MO&O

Acknowledging that the MSD's interpretation of Section 22.921(b)(1) of the Commission's Rules may be upheld (Petition, pp. 16-18), the Settling Parties urge, in the alternative, that the Commission "enforce" Section 22.33(b) of the Rules against TDS, requiring TDS to amend its application to substitute a new partnership as the applicant, in which Century and the other applicant signatories to the settlement agreement would participate.

The legal theory underlying this startling proposal is that the FCC should "disregard the corporate veil" between TDS and UTELCO and thus consider TDS part of the "joint enterprise" created by the settlement agreement.

The Settling Parties furnish no support, in the form of FCC decisions or policy statements, for the argument that Section 22.33(b)(2) may be used to force TDS to join a settlement group which the Settling Parties acknowledge it declined to join, much less in support of the argument that it may be used to do so in the face of a finding that TDS had no interest in the settlement group members' applications under Section 22.921(b)(1). And the text of the Rule (which the Settling Parties do not quote) makes

it clear that it cannot be used in this way. Section 22.33(b)(2) reads as follows:

> "(b) Cumulative chances of partial cellular settlements.
>
> ...
> (2) Markets Beyond the Top-120 and Rural Service Areas. In markets beyond the Top-120 cellular modified Metropolitan Statistical Areas and in Rural Service areas, the cumulative lottery chances described in paragraph (1) will be awarded to joint enterprises resulting from partial settlements among mutually exclusive wireline applicants only. Any joint enterprises resulting from a partial settlement among mutually exclusive non-wireline applicants for markets beyond the Top-120 Metropolitan Statistical Areas will not be entitled to cumulative lottery chances. Partial settlements among non-wireline applicants for Rural Service Areas are prohibited."

Section 22.33(b)(2) states explicitly that "cumulative lottery chances will be awarded to joint enterprises resulting from partial settlements among wireline applicants only." The section, by its terms, thus applies only to applicants entering settlement agreements. TDS, the applicant here, was not a signatory to the settlement agreement. Therefore, the section does not, by its terms, apply to TDS. UTELCO, the signatory to the settlement agreement, was not an applicant. Accordingly, the section also does not apply to UTELCO.

The Settling Parties may urge the Commission to disregard the plain meaning of the Rule, but it should not do so.

Moreover, assuming the Common Carrier Bureau upholds the finding that UTELCO's entry into the settlement group gave TDS no cross-interests in the applications of settlement group members under Section 22.921(b)(1), what reason would there be to construe Section 22.33(b)(2) to give settlement group members rights in

TDS's application? The sections complement each other and should be construed consistently, rather than inconsistently as the Settling Parties request.[3]

IV. TDS Had No Obligation To Report UTELCO's Entry Into The Settlement Agreement Under Section 1.65 of the Rules

The Settling Parties, with their customary courtesy, denounce the MSD for "elementary and sophomoric analysis" (Petition p. 18) in holding that TDS was not obliged to report UTELCO's entry into the settlement agreement under Section 1.65. We reiterate our earlier argument concerning this issue at pp. 10-11 of our Reply, and give our full support to the MSD's reasoning in Paragraph 8 of the MO&O concerning Section 1.65. It is only common sense that if TDS is not subject to the settlement agreement, it did not have to report it.

However, the Settling Parties now make one additional argument in support of their position (Petition, pp. 19-20) which merits brief discussion.

Portentously underlining the wording of Item No. 18 of Form 401, which requests information concerning Part 22 applications within 40 miles of the station being applied for, the Settling Parties argue that TDS's failure to disclose UTELCO's entry into the settlement agreement rendered the information supplied in

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[3] With respect to the Settling Parties' argument that the "corporate veil" between TDS and UTELCO should be disregarded, it should be noted that TDS and UTELCO are not the same, as parties other than TDS hold 51% of UTELCO. Further, since UTELCO did not file an application, its relationship to TDS is not properly before the FCC.